No. 10404.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PHILIP GREY SMITH, as Administrator with-Will-annexed of the Estate of Olive Wills Wigmore, Deceased, and J. A. WIGMORE,

Appellees.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEE PHILIP GREY SMITH, AS ADMINISTRATOR WITH-WILL-ANNEXED OF THE ESTATE OF OLIVE WILLS WIGMORE, DECEASED.

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Opinion Below.

The opinion of the District Court [R. 13-18] is reported at 48 F. Supp. 250.

Question Presented.

Whether both the Commissioner and the taxpayer, Olive Wills Wigmore, consented in writing to assessment of the tax against Olive Wills Wigmore for the taxable year 1933, at any time on or before June 30, 1937.

Statement.

Appellee Philip Grey Smith, as administrator with-will-annexed of the Estate of Olive Wills Wigmore, deceased, agrees with the statement presented by appellant in its opening brief, pages 4, 5 and 6, inclusive, except that appellee controverts the word "would" on page 6, first paragraph, line 2 of appellant's opening brief.

By an inadvertent printing of the transcript of record on page 22 in the eleventh Finding of Fact, the word "could" was printed to read "would." Counsel for appellant and appellee thereupon entered into a written stipulation that the transcript of record on appeal herein be corrected by interlineation of the clerk of the above entitled court. As finally corrected by interlineation, Finding No. XI set forth on page 22 of the printed transcript of record reads as follows:

"XI.

"That Olive W. Wigmore did not consent that the said income taxes for the taxable year 1933 could be assessed on or before June 30, 1937, or at any time after the 15th day of March, 1936."

Summary of Argument.

Whether the "consent in writing" is applicable to the assessment against the taxpayer who signs but is not mentioned therein depends upon whether it is clearly apparent from the face of the "consent" that both the Commissioner and such taxpayer intended it to be operative on the Commissioner and such taxpayer, although she was not named therein. If an agreement states distinctly that it is between two designated parties, the fact that another person's name appears at the end of the agreement with that of the parties does not make it the agreement of such other person. Moreover, and more specifically, the agreement in question here is a "Consent Fixing Period of Limitation Upon Assessment of Income and Profit Tax." Had the Commissioner of Internal Revenue intended that the consent apply to Olive Wills Wigmore individually, it would have been simple enough to make plain that intention. Olive Wills Wigmore might readily have been named in the body of the instrument. A designation of her there as "taxpayer" would have been amply sufficient.

Furthermore, the presumption is against the appellant, the Government. If there be any doubt as to the interpretation of the terms of the "consent in writing," that doubt certainly should be resolved against the Government, the party furnishing the printed form.

The opinion of the District Court should also be affirmed on the ground that the complaint is defective on its face in that it shows that more than two years had elapsed from the filing of the return on March, 1934, until the time of assessment, October 16, 1936.

ARGUMENT.

1. The Evidence Does Not Show a "Consent in Writing" by Both the Commissioner and Olive Wills Wigmore to Assessment Against Her After the Two Year Period, Under Par. (b) of Sec. 276 of the Revenue Act of 1932.

On March 13, 1934, decedent, Olive Wills Wigmore, and her husband, J. A. Wigmore, filed a joint Federal income tax return for the taxable year 1933 [R. 9, 20]. The return disclosed no tax liability [R. 9, 20]. On October 16, 1936, the Commissioner of Internal Revenue assessed income taxes for the year 1933 in the amount of $2,981.27, together with interest thereon, against Olive Wills Wigmore and J. O. Wigmore jointly [R. 11, 12, 21, 22]. The assessment was not timely made as to Olive Wills Wigmore under section 275(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, which requires that the assessment be made within two years from the date of filing the return. Since the return for the year 1933 was filed on March 13, 1934, the assessment to be valid must have been made before March 15, 1936 [R. 23]. However, before the two year period for the assessment had elapsed, more specifically on the 17th day of January, 1936, Olive Wills Wigmore and J. A. Wigmore signed a prepared form entitled "Consent Fixing the Period of Limitations on Assessment of Income and Profits Tax" [R. 20]. A photostatic copy of this original purported consent appears on page 10 of the transcript of record. The sole question is: did this consent operate to extend the time for assessment of 1933 income taxes against Olive Wills Wigmore until June 30, 1937, the time set therein [R. 23]?

No question is raised as to its effectiveness against J. W. Wigmore. The District Court upheld the contention of appellee (defendant below) that the consent was inoperative as to Olive Wills Wigmore and her estate, and did not extend the time within which the Commissioner of Internal Revenue might assess income taxes against Olive Wills Wigmore for the taxable year 1933 [R. 23]. Consequently the court held that neither Olive Wills Wigmore, her estate nor the defendant Philip Grey Smith, as administrator with-will-annexed of the Estate of Olive Wills Wigmore, deceased, is indebted to the plaintiff for any sum whatsoever on account of income taxes for the taxable year 1933 [R. 23].*

Appellant states, and appellee agrees, that the effectiveness of "the consent in writing" depends on intent. This was the question before the District Court [R. 14]. Appellant argues that since there was a joint income tax return filed for the year 1933 [R. 9], and since both taxpayers signed the consent in question [R. 10], it was obviously with the intent to do something in connection with the 1933 income taxes. Appellant's entire argument is a concentration on the signature of Olive Wills Wigmore affixed to the consent, with a conclusion that it must be there for some purpose. However, appellant looks beyond allotted territory in its attempt to uncover the intention of the parties interested in the purported waiver. Under the law the test to be applied in an attempt to answer the

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*Defendants, Estate of Olive Wills Wigmore, Deceased, and Philip Grey Smith as administrator with-will-annexed of the Estate of Olive Wills Wigmore, Deceased, did not deny [R. 8] their liability for taxes assessed against Olive Wills Wigmore for the year 1940. Consequently the District Court concluded [R. 23] that they were indebted to the plaintiff on account of the admittedly unpaid income taxes of said Olive Wills Wigmore for the taxable year 1940 [R. 23, 24].

question before this court is: whether the intent of the parties is disclosed by an examination of the face of the entire instrument. If there were any reasonable attempt to arrive at any agreement or consent, it should be determined by a close scrutiny of the instrument in question. (*Campbell v. Rotering,* 42 Minn. 115, 43 N. W. 795; *Wheeler v. Patterson,* 64 Minn. 231, 66 N. W. 964; *Stoutz v. Wilson Motor Co.,* 176 Okla. 316, 55 P. (2d) 990.) This is undoubtedly the test to be applied in this particular case. Olive Wills Wigmore is dead.

Appellee likewise calls the attention of the respected court to the consent in question [R. 10]. In an analysis of this instrument some consideration should be given to the signature of Olive Wills Wigmore affixed thereto and its effect, if any. In the subject of contracts the presumption raised by appellant from the presence of her signature has been answered in at least one court. While a waiver or consent is not a contract but essentially a voluntary unilateral waiver of a defense by the taxpayer (*Florsheim Bros. etc. v. United States,* 280 U. S. 453), the District Court, in reliance on *Stange v. United States,* 282 U. S. 270, at p. 275, logically could see no reason why the rules applicable to the construction of a contract should not apply to the construction and effect of a waiver [R. 15]. In 6 R. C. L., page 875, the following language is found:

> "* * * If a contract states distinctly that it is between two designated parties, the fact that another person's name appears at the end of the contract with that of the parties does not make it his contract. * * *"

Shriner v. Croft, 166 Ala. 146, 51 So. 884, 139 A. S. R. 19, 28 L. R. A. (N. S.) 450, is the case on which the editors of Ruling Case Law rely. In that case the following statement is made by the court:

> "The first assignments of error insisted on (numbered 1 and 2) are to the sustaining of the demurrer of Mary R. Shriner, on the ground that the complaint shows on its face that Mary R. Shriner was not a party to the contract sued on, and the third, fourth, and fifth assignments relate to the same subject, to-wit, to the refusal of the (21) court to grant the motion for the discontinuance of the case, because of the amendment of the complaint, by striking out the name of said Mary R. Shriner.
>
> "There was no error in either action of the court. The contract sued on is set out in the complaint, and it states distinctly that it is between W. A. Shriner and John Craft. The fact that Mary R. Shriner's name appears at the end of the contract with W. A. Shriner does not make it her contract. * * *"

Appellant apparently realizes the damaging effect this precedent has on his argument. In an attempted reinforcement, appellant, on page 13, line 8, *et seq.*, in his opening brief states the proposition that one who signs a surety *bond* will be regarded as a surety, although his name is not mentioned in the body of the bond. In such a situation, appellant urges that it is therein presumed that the surety had some purpose in signing and that his intention was to be bound. Not wishing to indulge in tangents, appellee, however, desires to point out that at least two of the authorities cited by appellant also stand for appellee's contention that a subscriber not named in the body of an instrument is liable thereon only if it can

be determined from the face of the instrument that he *intended* to be bound by its conditions. For example, in *Wheeler v. Patterson,* 66 N. W. 964, at page 965, the court found this intention present and said,

> "The wording of the face of the bond shows that the person who signed, though not named in the body of the agreement, expressly declared over his signature that in witness of his obligation to perform the conditions of the bond, he signs and seals it."

And in *Campbell v. Rotering, et al.,* 43 N. W. 795, the court also found this intent present and, after explaining the rule, said at page 796:

> "For instance, where, as in this case, it reads 'We,' then stating the obligation or understanding, it is, if there be nothing else to show the contrary, the contract of the parties who execute it."

However, appellee now states his belief that the position of the parties in Principal-Surety instruments is of little similarity to those inherent in the matter now before this court. As to the instrument here involved, there is a different evidentiary burden on the parties than exists in the analogy suggested by appellant; here appellee, by showing the presence or absence of certain factors, invokes the application of presumptions and constructions totally lacking in the Principal-Surety situations.

This appeal is to be decided by determining whether or not it is disclosed on the face of the instrument that the parties intended the agreement to be operative as to Olive Wills Wigmore [R. 10]. Parties who intend to perpetuate their agreement in a written memorandum usually spell it out in the body of that instrument. The

document here is on a printed form furnished by appellant through its Bureau of Internal Revenue; there is a space left for the insertion of the name or names of taxpayers who are to consent and agree with the Commissioner of Internal Revenue. A close reading of the instrument shows that here only two people agree and consent on the terms set forth therein; nowhere does the name of Olive Wills Wigmore appear in the body of the consent, and nowhere does she agree with the Commissioner or the Commissioner agree with her.

The method of agreeing that an assessment may be made within a period extending beyond the two years after the date the return was filed is clearly set forth in the statute governing the matter.

The Revenue Act of 1932, c. 209, 47 Stat. 169, states as follows in section 276(b): "Where before the expiration of time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon." Under this statute, the *taxpayer* must consent with the Commissioner of Internal Revenue in writing to put a period of limitation upon the assessment of income tax.

See, 5 *Paul & Mertens,* section 5049, p. 555, where the following is given:

> "However, both the Commissioner and the taxpayer must 'consent' to the extension of time . . ."

In *U. S. v. Hammerstein* (D. C. N. Y.), 20 Fed. Supp. 744, involving a suit by the government against husband and wife, who had filed a joint income tax return to collect a deficiency claimed to be due from the wife, the court dismissed the complaint as to the wife because no timely assessment had been made against her.

The Government contended that where a joint return is made, there is only one taxpayer, an entity composed of two spouses and therefore an assessment against the member of the entity in whose name the return is filed, is an assessment against both members. The court rejected this contention and pointed out that where a husband and wife filed a joint return, each of them remains a separate and distinct taxpayer and, therefore, an assessment against the husband cannot be considered an assessment against the wife.

In *Cole v. Commissioner,* 81 Fed. (2d) 485, the question was, since deceased husband and wife filed a joint return, whether the husband's estate was liable for deficiency assessment where the deficiency was attributable to wife's income rather than the husband's. It was held that the spouses were *not* jointly and severally liable for a deficiency arising out of the separate income of one of them.

To reach this conclusion, the court made inquiry into the status of husband and wife and the filing of joint income returns. The court, at page 486, quotes from *Gummy v. Commissioner,* 26 B. T. A. 894, where the Commissioner advanced the theory that, having elected to file a joint return, the husband and wife became a single taxing entity, and, as such, "the taxpayer." The Board rejected this theory and, in speaking of an allowance of

losses to individuals, quotes the word "taxpayer" from the statute. (Sec. 118 of the 1928 Act, 26 U. S. C. A., Sec. 23.) The Board decided: " 'Taxpayer' means any person subject to a tax imposed by the act, and the term 'person' includes an individual." The Board further held: "Had Petitioner and his wife filed separate returns, there would be no question about the deductibility of the losses sustained by each. In filing a single joint return, they lost none of such rights; each remained an individual, and, as such, a taxpayer, within the meaning of section 118 of the statute."

In *Cole v. Commissioner, supra,* the court also quotes from *Fawcett v. Commissioner*, 31 B. T. A. 139, where the Commissioner had contended that by reason of electing to report their income for 1929 in a joint return, the husband and wife must, for all purposes of the revenue act, be treated as one. The Board there held:

> ". . . While there may be some logic in his view, we find no authority for it in the revenue acts, and it is a cardinal rule of construction of taxing statutes that there can be no tax imposed by implication or construction, and in case of doubt or ambiguity, either as to the fact of the imposition or as to the amount thereof, it must be resloved in favor of the taxpayer."

Appellee does not intend to inject into this appeal the problem of whether Olive Wills Wigmore and J. A. Wigmore were individually liable or jointly and severally liable for 1933 taxes [R. 17]; but he does contend that at the time the purported waiver was agreed upon, at least, neither the statutes (Revenue Act of 1932, c. 209, 47 Stat. 169) nor the court decisions on the subject considered

persons filing a joint tax return as losing their identity of separate taxpayers. (*Commissioner v. Uniacke,* 132 F. (2d) 781, 782.) Hence, though J. A. Wigmore and Olive Wills Wigmore filed a joint 1933 tax return, yet they were separate and distinct taxpayers under the cases interpreting the word "taxpayer" as given in section 276(b), *supra.*

In *Commissioner of Internal Revenue v. Uniacke,* 132 F. (2d) 781, the Circuit Court of Appeals, second circuit, declared that while Congress in 1938 expressly imposed joint and several liability as a condition upon exercise of the privilege of filing a joint return (52 Stat. 476, 26 U. S. C. A. Int. Rev. Code, sec. 51(b)), yet it points out that this provision was not made retroactive, and disagrees with the Commissioner's contention that it was merely declaratory of the law under earlier revenue acts. In this case the Commissioner further urged that there was no injustice in treating both spouses as a "taxable unit" and holding them jointly and severally liable for the tax computed on their combined incomes, since they had voluntarily elected to obtain such tax advantages as a joint return permits. The court, at page 782, replied:

> "Arguments of what is fair have little to do with the construction of tax statutes."

Therefore to be operative as against the Estate of Olive Wills Wigmore, the consent [R. 10] must have expressly mentioned Olive Wills Wigmore, *a taxpayer,* in the body thereof.

From section 276(b) of the Revenue Act of 1932, *supra,* it is also apparent that *both* the Commissioner and the taxpayer must consent in writing to any assessment after

the two year period. There is thus a "period so agreed upon," which may be extended by "subsequent agreements in writing."

An examination of Plaintiff's Exhibit No. 2 discloses that the Commissioner consented only to an extension of the period as to J. A. Wigmore and not as to Mrs. Olive Wills Wigmore. J. A. Wigmore's name alone is inserted in the body of the form, and the exhibit states [R. 10] that the agreement is between the Commissioner and J. A. Wigmore. The consent of the Commissioner extends only to J. A. Wigmore, the "above named taxpayer," and since there could be no extension without the consent or "agreement" of *both* the Commissioner and the taxpayer, it would be immaterial whether Mrs. Wigmore intended to consent to an extension as to an assessment against her when she affixed her signature.

To put the matter another way, suppose that Mrs. Olive Wills Wigmore had insisted that the Commissioner had given his written consent as to her. She could not show that merely because she affixed her signature to the agreement the provisions thereof applied to her, and that the Commissioner had given his written consent as to her. The Commissioner's argument under such circumstances would undoubtedly have been that the name of J. A. Wigmore was the only name inserted in the agreement and that all references in the agreement were to Mr. Wigmore as the taxpayer, and that he did not intend to give any consent with reference to Mrs. Wigmore, who was not a party to the instrument but who merely affixed her signature. It is submitted that under such circumstances the contentions of the Commissioner would be irrefutable.

This situation is not altered by the fact that at a date later than that upon which the agreement was executed the Commissioner chose to assert, or does now assert, that he did give his written consent to an extension of the period for assessment as to the taxpayer Olive Wills Wigmore. The writing must be construed as of the time it was executed.

While appellee has found no federal case square with the facts of this case now on appeal, yet research revealed the following opinions so close on the facts as to be of persuasive influence.

In *American Loan Co. of Camden v. Helvering, Commissioner* (Ct. Ap. Dist. Col.), 70 Fed. (2d) 290, the question was who was bound by a waiver of the statute of limitations extending the period of assessment of the taxes involved therein. The court said on page 291:

> "The petitioner presents also a question relating to the statute of limitations. It appears that petitioner executed and delivered to respondent a waiver of the statute of limitations dated March 7, 1930, extending the period for assessment of the taxes involved herein to December 31, 1930. The notice of deficiency was dated April 23, 1930, and the appeal was taken June 16, 1930.
>
> "It appears that the name of the parent corporation of the affiliated group appears at the top of the printed form upon which the waiver was written but not in the caption or body of the written consent. It is argued that because of these facts the waiver should be confined to the affiliated period for which a consolidated return was filed, and should not apply to the separate return filed by petitioner. We think, however, that the petitioner and not the parent com-

pany was the party bound by the agreement, and consequently that petitioner effectually waived the statute of limitations thereby."

Commissioner of Internal Revenue v. Bryson (C. C. A. 9th Cir.), 79 Fed. (2d) 397, is more in point. In this case one of the problems was whether a waiver signed by Elmer D. Bryson, as former secretary of the corporation named in the body of the waiver, was sufficient to bind the secretary individually as transferee of the corporation to a waiver of limitation of period for tax assessment. The secretary was not named in the body of the waiver. The court at page 401 said:

> "This contention can be disposed of briefly. The text of the document purports to bind the corporation. It is signed by the respondent as 'former secretary' of the corporation, which is described as 'taxpayer' . . . Without distorting plain words from their ordinary meaning, a transferee's waiver cannot be spelled out of the inchoate paper we are here considering."

And in a concurring opinion, Judge Denman, at page 402, discusses the waiver at length. He says:

> "I concur in the decision. The body of the waiver produced by the Commissioner purports to be an agreement between the Bryson-Robinson Corporation and the Commissioner. It is on a printed form, furnished by the Commissioner, and the only insertions possibly to be attributed to the taxpayer to whom it is tendered are its name in the body of the instrument and the signature. It was not signed in the

corporate name. The signer, Bryson, described himself to be a 'former secretary.' In an accompanying letter, he disclaims authority to act for the corporation. *The wording of the document contains no agreement on the part of Bryson individually.*" (Emphasis added.)

"*. . . Had the Commissioner of Internal Revenue sought a waiver of the statute of limitations by Bryson individually, it would have been simple enough to make plain that intention without varying from the general form of 'Income and profits tax waiver' which has been in customary use in the Internal Revenue Department since the Revenue Act of 1921 (42 Stat. 227), and which was the form utilized in the instant case.* Bryson might have been named in the body of the instrument as 'transferee.' A description of him there as 'taxpayer' would have been amply sufficient. It is a persuasive factor negativing the Commissioner's intent to hold Bryson personally, that instead of taking such elementary steps to cause the waiver to speak thus clearly, he affixed his signature to a document which on its face bound no one, and from which can be read a transferee's liability only by an ultra refined metaphysical construction animated by a strong presumption in favor of the government and against the taxpayer." (Emphasis added.)

Although we cannot agree with appellant that a purpose must be ascribed to Olive Wills Wigmore in the affixing of her signature to the agreement, and although we contend that the agreement is clear that neither she nor the Commissioner consented to any extension of the period for assessment as to her tax, we call to the court's attention the circumstances suggested by the notation appended

to the end of the agreement, which is as follows [R. 10, 14]:

> "If this consent is executed with respect to a year for which a joint return of a husband and wife was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other. * * *"

When the form was presented to Olive Wills Wigmore she had not yet signed, and in reading what preceded the place for her signature she would see a consent as to an extension with respect to the taxpayer, J. A. Wigmore. She would then read that such consent (referred to as "this consent") must be signed by both spouses to make it effective, since the return was joint.

The appellee then has effectively performed his task; he has shown that under the applicable test it was the intent of Olive Wills Wigmore not to be bound by the terms of the consent when she affixed her signature thereto, and that it was the intent of the Commissioner not to have the consent operative as to her. Since the intent of the parties was not to have the consent apply to Olive Wills Wigmore, her contention that the assessment of October 16, 1936, was invalid as to her, must be sustained.

If, despite the logic of appellee's contention, it be assumed that the intent of the parties is doubtful, still the presumption is against the government. The Commissioner supplied the consent. He originated whatever doubt may be argued to exist, and he had the burden of establishing the construction he contends should be given the consent—especially when that construction is so favorable to himself. This the plaintiff has failed to do.

As said in the *Bryson* case, *supra,* at page 402:

> "It is familiar doctrine that 'taxing acts, including provisions of limitation embodied therein (are) to be construed liberally in favor of the taxpayer.' *United States v. Updike, supra,* 281 U. S. 489, at page 496, 50 S. Ct. 367, 369, 74 L. Ed. 984."

And at page 403 of the *Bryson* case, Judge Denman stated in his concurring opinion:

> "In addition to the proper presumption which is against the government, it may be said that if there were doubt as to the interpretation of the terms of the writing, that doubt certainly should not be resolved with any presumption in favor of the party furnishing the printed form. *Commissioner v. Leasing & Building Co.* (C. C. A.), 46 F. (2d) 2, 4."

In *Erskine v. U. S.,* 84 Fed. (2d) 690-1, it was said:

> "Such revenue acts must be construed strictly in favor of the appellant sought to be charged as importer. He is 'entitled to the benefit of even a doubt.' Tariff Act 1897, 30 Stat. 151; United States v. Riggs, 203 U. S. 136, 139, 27 S. Ct. 39, 40, 51 L. Ed. 127; Hartranft v. Wiegmann, 121 U. S. 609, 616, 7 S. Ct. 1240, 30 L. Ed. 1012; Miller v. Standard Nut Margarine Co., 284 U. S. 498, 508, 52 S. Ct. 260, 76 L. Ed. 422."

Hopefully the appellant now urges that statutes of limitation should be resolved in its favor. Logically and realistically it is, of course, optional with the taxpayer whether he will waive or take advantage of the benefit of the statute of limitation. In L. O. 1095, C. B. June,

1922, page 313, the Solicitor of Internal Revenue very fairly said:

> "The Government itself insists on the benefit of the statute of limitations and holds that a refund due a taxpayer cannot be applied on a later tax when the amount refundable is barred by the statute. It is believed that both in good conscience and by legal right the same rule must apply when it works to the advantage of the taxpayer."

Lastly, as usual, appellant resorts to the plea of estoppel as against appellee. Judge Denman, at page 403 of the *Bryson* case, *supra*, once before answered appellant's contention when he said:

> "I know of no doctrine of estoppel to deny that a written instrument is something other than what its terms necessarily import, except as based on some fraud or misrepresentation. None is shown here."

2. The Decision of the District Court Should Also Be Affirmed on the Ground That the Complaint Is Defective on Its Face in That It Shows That More Than Two Years Had Elapsed From the Filing of the Return on March 15, 1934, Until the Time of Assessment, October 16, 1936 [R. 3].

Under the Revenue Act of 1932, c. 209, 47 Stat. 169, section 275(a), the assessment must have been made within two years after the return was filed. Under 276(c) the tax may be collected by distraint or by a proceeding in court "where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto . . .". Since this is a taxing statute, provisions therein are to be construed

liberally in favor of the taxpayer. (*U. S. v. Updike*, 281 U. S. 489, 496, 50 S. Ct. 367, 74 L. Ed. 984.) Since the tax may be collected either by distraint or by proceeding in court if it has been assessed within time, it is difficult to see how a proceeding in court may be brought if not assessed within time, as required by the statute (Sec. 276(c), *supra*).

As is said in *Jenkins v. Smith,* 21 Fed. Supp. 433, at page 437:

> "Where assessments are made, or required to be made, there are two methods of compelling payment, one by suit, a judicial proceeding; the other by distraint, an executive proceeding. In either case, compliance with statutory conditions precedent, including initiation of proceedings within the time specified, is necessary. *Bowers v. New York & Albany Lighterage Co.* (1927), 273 U. S. 346, 47 S. Ct. 389, 71 L. Ed. 676."

While the lower court in the *Jenkins* case was reversed in (C. C. A. (2d) 1938), 99 Fed. (2d) 827, on the question of whether notice by the "Collector" was an inevitable constitutive factor to his right to collect, still the court in reversing did not disagree with or overrule the above quotation of the District Court.

The reasonable interpretation of section 276(c), *supra,* is that the Congress intended the assessment within time as necessary to the right to commence proceedings in court. It adds nothing to the power of the Government to sue, but places a necessary limitation upon its right to

sue. Congress intended that when the period of limitation for assessment had run, the taxpayer should no longer be subject to uncertainty as to his liability to the Government.

In *U. S. v. Updike*, 281 U. S. 489, 50 S. Ct. 367, 74 L. Ed. 984, at page 990, the court held:

> ". . . it seems reasonably clear that the saving clause 'within the statutory period of limitation properly applicable thereto,' was inserted solely for the protection of the taxpayer; that is to say, in order to preclude collection of the tax even within 6 years after the assessment if that assessment, when made, was barred by the applicable statutory limitation."

Since the complaint herein on its face discloses a lapse of more than two years before the assessment was made [R. 3], it shows that the plaintiff had lost its right to bring a proceeding in court. Plaintiff has failed to state the *prima facie* elements of a claim. While the complaint need not plead matter anticipatory of a possible defense, still under Rule 8(a) of the Federal Rules of Civil Procedure, a pleading which sets forth a claim for relief "shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 9(c) of the Federal Rules of Civil Procedure allows the general averment that all conditions precedent have been performed. The implication is that in the absence of this general allegation, facts must be pleaded with particularity, showing such performance or occurrence. By plaintiff's omission of both, there was no duty on defendant to deny specifically and with particularity before the District Court.

While this ground was not raised below and therefore not assigned by the District Court, still the Circuit Court of Appeals can affirm the decision of the District Court, though on another ground. As said by the court in *McBrine Co., Ltd. v. Silverman,* (C. C. A. 9th) (1941), 121 Fed. (2d) 181, at page 182:

> "That we may affirm on a ground not assigned by the trial court is well settled. *Collier v. Stanbrough,* 6 How. 14, 21, 12 L. Ed. 324; *Frey & Son v. Cudahy Packing Co.,* 256 U. S. 208, 210, 415 Ct. 451, 65 L. Ed. 892; 3 Am. Jur., Appeal & Error, sec. 1163, 674; 5 C. J. 5, Appeal & Error, sec. 1849, pp. 1334, 1335."

See, also:

> *Pevely Dairy Co. v. Borden Printing Co.* (C. C. A. 9th, 1941), 123 Fed. (2d) 17.

In *Van Buskirk v. Kuhns,* 164 Cal. 472, 129 Pac. 587, the defendant appealed from a judgment against him, and from an order denying his motion for a new trial. Plaintiff sued to foreclose a mortgage on land, and defendant raised the bar of the statute of limitations. The plaintiff contended that the statute of limitations did not bar an action on defendant's promise to pay "when able," since such a promise was conditional and no cause of action accrues until the condition is performed, that is to say, until the debtor is able to pay.

The court agreed with the plaintiff, and on page 475 said:

> "But if the views above expressed are sound, the very fact that prevents the statute from running (i. e., the lack of ability, on Reynold's part, to pay his debt), operates also to prevent the plaintiff from maintaining his action. The reason that the statute

does not run is that the promise is conditional upon the debtor's ability to pay, and that a cause of action does not accrue until such ability exists. If the promise conditional upon such ability, it is, as is said in *Rodgers v. Byers,* 127 Cal. 528 (60 Pac. 42), incumbent upon the plaintiff to allege and prove that the condition has been complied with. This is not, like the plea of the statute of limitations, matter of defense. It is a substantive part of the cause of action, and the burden of proof with respect to it, is upon the plaintiff. (*Bidwell v. Rogers,* 10 Allen, 438; *Boynton v. Moulton,* 159 Mass. 248 (34 N. E. 361); *Veasey v. Reeves,* 6 Ind. 406; *Halladay v. Weeks,* 127 Mich. 363 (89 Am. St. Rep. 478, 86 N. W. 799); *Parker v. Butterworth,* 46 N. J. L. 244 (50 Am. Rep. 407). The complaint contains no allegation of such ability, and the court does not find it. There is, therefore, a want of averment and finding of facts establishing the existence of a cause of action. The plaintiff alleges a promise to pay in a certain event. He does not allege, and the court does not find, that the event upon which the obligation depends, has occurred. Neither the complaint, therefore, nor the findings, support the judgment. This defect is one that may be reviewed on an appeal from the judgment."

Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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